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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BEVERLY J. FORSBERG, a widow, Plaintiff/Appellee, v. ALAN K. and BONNIE OSUMI and RADIOLOGY SPECIALISTS OF SOUTHERN ARIZONA, PLLC, Defendants/Appellants.	2 CA-CV 2011-0004 2 CA-CV 2011-0092 (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200901051

Honorable Stephen M. Desens, Judge
Honorable John F. Kelliher, Judge

REVERSED AND REMANDED

Merkin & Associates
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and

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H O W A R D, Chief Judge.

¶1 Appellants Alan and Bonnie Osumi and Radiology Specialists of Southern Arizona ("Osumi") appeal from the trial court's grant of summary judgment in favor of Beverly Forsberg and denial of Osumi's cross-motion. Osumi argues the court erred by misinterpreting the contract between the partners in Radiology Specialists and in barring evidence under the parol evidence rule. Because the record supports only Osumi's interpretation of the contract, we reverse and remand.

Factual and Procedural Background

¶2 We view the facts and reasonable inferences from those facts in the light most favorable to the party against whom summary judgment was granted. *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). Osumi and Forsberg's husband, Dr. Gary Forsberg ("Dr. Forsberg") each owned a fifty percent interest in a radiology practice. They purchased million-dollar life insurance policies on one another's lives, which became effective in 2003. In September 2007, they entered into a "Cross Purchase Buy-Sell Agreement," setting forth various scenarios under which a membership interest might be sold and purchased, including a provision that each doctor would obtain a life insurance policy, the proceeds of which would "provide cash" to purchase the deceased doctor's share in the practice. Dr. Forsberg died in August 2008, at which point Osumi received one million dollars as the sole beneficiary to a life insurance policy on Dr. Forsberg's life.

¶3 Forsberg sued Osumi alleging several causes of action, including that Osumi had breached the "Buy-Sell Agreement" and that she was entitled to the full one million dollars of insurance benefits for the purchase of Dr. Forsberg's membership interest. Forsberg and Osumi filed cross-motions for summary judgment on the breach of contract issue. The trial court granted Forsberg summary judgment and included Rule 54(b), Ariz. R. Civ. P., language in its judgment, and Osumi appealed. Forsberg moved to dismiss her remaining claims, and the court dismissed them with prejudice. The court then awarded costs and attorney fees in a final judgment. Osumi appealed from the final judgment, and both parties stipulated to consolidate the appeals.

Jurisdiction

¶4 Forsberg argues this court lacks jurisdiction over the appeal from the trial court's partial summary judgment because the court's decision was not a final judgment under Rule 54(b). However, an appeal from a final judgment includes intermediate orders even if the orders would not be appealable separately. *Rourk v. State*, 170 Ariz. 6, 12-13, 821 P.2d 273, 279-80 (App. 1991); *see also* A.R.S. § 12-2102(A) (in appeal from final judgment appellate court "shall review any intermediate orders involving the merits of the action and necessarily affecting the judgment"). Thus, because we have jurisdiction over the final judgment, we necessarily have jurisdiction over the intermediate orders and need not decide whether we separately had jurisdiction over an intermediate order. And because we reverse the grant of summary judgment in favor of

Forsberg, we need not decide whether she timely filed her request for attorney fees and costs.

Motion for Partial Summary Judgment

¶5 Osumi argues the trial court erred by granting Forsberg's motion for summary judgment because the Agreement is reasonably susceptible to his interpretation that the parties intended to utilize an alternative method to establish a base price in the event an annual meeting of members did not occur. Thus, he contends, if a question of material fact exists, the trial court erred by failing to consider his parol evidence to establish the intent of the parties in such a situation. Osumi requests that we grant summary judgment in his favor. We review de novo a grant of summary judgment. *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, ¶ 14, 129 P.3d 966, 971 (App. 2006).

¶6 Summary judgment is required where there is "no genuine issue as to any material fact." Ariz. R. Civ. P. 56(c)(1). Our supreme court has interpreted this rule to mean that, "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense," summary judgment should be granted. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶7 We may interpret a contract as a matter of law. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). Our primary goal in

interpreting the language of a contract is to determine and give effect to the intent of the parties. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). To determine intent, we look at the plain meaning of the words in the context of the whole agreement. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983). We may consider parol evidence in determining the appropriate interpretation of a contract, but only if it is relevant to the proponent's proffered interpretation and the contract's language is "'reasonably susceptible'" to that interpretation. *Long v. City of Glendale*, 208 Ariz. 319, ¶ 28, 93 P.3d 519, 528 (App. 2004), *quoting Taylor*, 175 Ariz. at 155, 854 P.2d at 1140. Parol evidence is not admissible if it "would actually vary or contradict the meaning of the written words" of the contract. *Id.* ¶ 29. And "whether a contract is reasonably susceptible to more than one interpretation is a question of law, which we review de novo." *Grosvenor Holdings, L.C.*, 222 Ariz. 588, ¶ 9, 218 P.3d at 1050.

¶8 In this case, Dr. Forsberg and Osumi purchased million-dollar life insurance policies on one another's lives, which became effective in 2003. Then, they signed the "Cross Purchase Buy-Sell Agreement" in September 2007. The stated purpose of the Agreement was to provide for the purchase and sale of membership interest in the company under various circumstances. Section four states that, in the event of the death of a member, the remaining member may purchase the deceased member's interest, but

he is not required to do so.[1] Section five of the Agreement sets forth that the value of the membership interest to be transferred "shall be equal to the sum of the base price as determined by the Members at their prior year's meeting of Members prior to the date of death." Both parties agree that no annual meeting of members occurred after the signing of the Agreement.

¶9 Section nine requires the trustee to "apply for an increasing-benefit life insurance policy . . . in an amount equal to the price valuation established under Section 5" in order to "provide cash" to purchase the deceased member's interest. These policies are to be listed in Schedule two. In section ten the Agreement provides that if the insurance proceeds are more than the base price of the interest, the trustee shall pay the excess to the surviving members or the company. Section twenty-one provides that the written contract "embodies the entire Agreement" and cannot be amended or modified except in writing. Schedule two lists a life insurance policy for each member in the amount of one million dollars.

¶10 Osumi argues that the parties failed to set the base price as called for in the Agreement and that admissible parol evidence showed they had agreed to a different method for valuing the shares. Forsberg, on the other hand, claims the only logical

[1]At oral argument Osumi contended that he never had made an offer to purchase Dr. Forsberg's interest under section four, thereby rendering the issue of base value irrelevant. But he did not argue this below and we will not reverse summary judgment on an issue not raised in the trial court. *See Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 90, 796 P.2d 881, 892 (1990).

reading of the Agreement is that the listing of the policies in Schedule two shows the parties set the base price at one million dollars.

¶11 Section five unambiguously requires the members set the base price at the "prior year's meeting of Members." Because no such meeting occurred, the provisions of the Agreement concerning the base price were unfulfilled.

¶12 Section five is not reasonably susceptible to Forsberg's interpretation that the meeting to sign the Agreement was the meeting to set the base price. Section twenty-one states that the Agreement "embodies the entire Agreement reached by the Members hereto with respect to the subject matter hereof and shall not be amended or modified except by an instrument in writing duly executed by the Members hereto." Forsberg's interpretation attempts to add to the Agreement an alleged term that the initial base value would be one million dollars, until the annual meeting of members, but the parties' Agreement does not include that provision. Therefore, section twenty-one precludes the inclusion of the provision Forsberg asserts. And Forsberg's attempt to amend the term "prior year's meeting of Members" to the meeting to sign the Agreement also would violate section twenty-one.

¶13 Forsberg attempts to support her argument with section nine of the Agreement which states that "the Trustee shall apply for an increasing-benefit life insurance policy . . . in an amount equal to the purchase price valuation established under Section 5. Such life insurance policies purchased to date or any life insurance policies hereafter acquired shall be listed [in] . . . Schedule 2." Although the million-dollar

policies indeed were listed in Schedule two, section five, specifically referred to in section nine, requires the base price be set at an annual members' meeting. No such meeting ever occurred. And the record shows that the trustee did not apply for the policies at issue and that they are not increasing-benefit life insurance policies.

¶14 Additionally, section ten contemplates a scenario in which the insurance policy benefit would exceed the base value of the company. Considering the Agreement as a whole, *United Cal. Bank*, 140 Ariz. at 259, 681 P.2d at 411, the parties did not tie the base price to be paid on the death of one of the parties to the benefit amount of the insurance policies. Even if the parties had intended that the policies' benefits be used for the buy-out, their agreement did not establish their intent that one million dollars be the base price. Thus, the fact the policies are listed in Schedule two does not support Forsberg's position. We conclude the parties intended the base price to be set at an annual meeting and did not intend the listing of the insurance policies in Schedule two to mean that the base price to be paid upon the death of one of the parties was one million dollars.

¶15 Moreover, even if the Agreement was reasonably susceptible to Forsberg's interpretation, thereby making parol evidence admissible, *see Long*, 208 Ariz. 319, ¶ 28, 93 P.3d at 528, the uncontested parol evidence shows that the parties did not intend the initial base price to be one million dollars. *See Taylor*, 175 Ariz. at 152, 854 P.2d at 1138 ("[a]ntecedent understandings and negotiations may be admissible" to interpret contract). Both Osumi and the practice's trustee at the time the Agreement was signed stated in

their depositions that Osumi and Forsberg had intended the value of the company to be based on the practice's bank account balance and the amount of their accounts receivable. They avow the parties did not consider their interest in the practice to be worth one million dollars, but instead intended the surplus life insurance proceeds to assist with expected business expenses arising from one party's death. Forsberg does not provide any contradictory parol evidence.

¶16 Based on the language of the Agreement as a whole and the available parol evidence, reasonable people could not accept Forsberg's interpretation of the Agreement. Therefore, we reverse the trial court's grant of partial summary judgment in favor of Forsberg and enter summary judgment in favor of Osumi. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

Attorney Fees

¶17 Because we reverse the grant of partial summary judgment in favor of Forsberg, we also vacate the trial court's award of attorney fees and costs to her. Both parties request attorney fees and costs on appeal under A.R.S. § 12-341 and 12-341.01. We deny Forsberg's request for attorney fees on appeal. However, we grant Osumi's request for costs and attorney fees on appeal upon compliance with Rule 21, Ariz. R. Civ. App. P. Further, we remand to the trial court for entry of costs and fees in that court.

Conclusion

¶18 For the foregoing reasons, we reverse the trial court's grant of partial summary judgment to Forsberg, enter summary judgment in favor of Osumi, and remand for further proceedings consistent with this decision.[2]

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

[2]Because we decide this appeal on this basis, we need not address Osumi's remaining argument that section seventeen of the Agreement provides that the Agreement would terminate if the parties had failed "to provide for any remaining purchase balance at a Member's death or disability."